BEFORE THE THREE PERSON DUE PROCESS HEARING PANEL EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION PURSUANT TO SECTION 162.961 RSMo.

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Petitioner,	)
	)
v.	)
	)
NORTHWEST R-I SCHOOL DISTRICT,	)
	)
	)
Respondent.	

COVER SHEET

1. Parties

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Date of Due Process Hearing Request: January 23, 2004
Dates of Due Process Hearing: April 20, 21 and 22, 2004

BEFORE THE THREE PERSON DUE PROCESS HEARING PANEL EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION PURSUANT TO SECTION 162.961 RSMo.

IN THE MATTER OF:	)
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...,	)
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Petitioner,	)
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v.	)
	)
NORTHWEST R-I SCHOOL DISTRICT,	)
	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Hearing Panel, after hearing and giving appropriate weight to the evidence in this matter, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

I. Issues and Purpose of the Hearing

Petitioner raised the following issues in his Amended Statement of Issues, which were addressed at the hearing:

1. "In September of 2002 Student's parents sought special education services from Respondent.
2. Prior to the first IEP meeting with Respondent, Student's parents submitted reports from his First Steps Occupational, Speech and Developmental Therapists, which recommended specific services for Student that included but were not limited to, weekly occupational therapy and speech therapy; Student's Neurologist diagnosed Student as having Autism Spectrum Disorder.

3. In September of 2002 the IEP team issued an IEP for Student that did not incorporate the services recommended by Student's First Steps Therapists; the Respondent's IEP did not dispute Student's medical diagnosis of Autism Spectrum Disorder.

4. In January of 2003, at the request of Student's parents, the IEP team met to consider parental requests to amend Student's IEP and increase the services that Student was to receive from Respondent.

5. In January of 2003 Student's IEP was amended so that Student was to receive among other services, 120 minutes of weekly speech therapy, 60 minutes of occupational therapy consultation per month and a weekly total of 720 minutes of special educational services; although Respondent questioned Student's medical diagnosis of Autism, it presented no medical diagnosis contrary to this finding.

6. At the January IEP meeting Student's parents presented a report to Respondent from his Neurologist which included an occupational therapy recommendation.

7. This recommendation indicated that Student received 60 minutes of weekly occupational therapy to improve his sensory processing abilities.

8. In February of 2003, after Respondent received the report provided by Student's parents, which was completed by Student's private Occupational Therapists, the IEP Team refused to modify or change its January 2003 IEP.

9. Respondent did not conduct an occupational therapy evaluation of Student until April of 2003; the evaluation done by Respondent did not include any testing of Student's sensory processing abilities.

10. Prior to April of 2003 Respondent did not have any occupational therapy plan in place for Student.

11. Respondent failed to provide occupational therapy consultation for Student prior to April of 2003 as stipulated in their IEP. Additionally, following their April 2003 evaluation, Respondent continued to fail to meet the occupational therapy IEP requirement in that no plan to assist Student with his sensory processing abilities was ever issued by Respondent.

12. The January IEP required Student to receive 120 minutes of weekly speech therapy.

13. After January of 2003 Student did not receive the required speech therapy in that some of the so called "services" he was receiving were in a group setting and not the one on one setting suggested by the IEP; not only is time shared in group therapy settings not equivalent to one on one therapy, but Student also has not received all of the daily and weekly services for speech therapy as set forth under the IEP.

14. After January of 2003 Student did not receive 720 minutes of weekly services from Respondent as required by the IEP.

15. Due to the Respondent's failures to follow the program set forth by Student's IEP of January of 2003, he was denied a FAPE.

16. Since September of 2002 Respondent has not provided Student with occupational therapy as requested by Student and his parents and recommended by his Neurologist and Occupational Therapists; this failure has resulted in the denial of a FAPE to Student.

17. Since September of 2002 Student and his parents have requested that sign language be incorporated into his education by a person trained to use sign language to provide assistance to Student in his communicative skills; Respondent has failed to comply with this request which has inhibited his ability to communicate with others.

18. That the failure to provide Student with sign language training has caused Student to be denied a FAPE by Respondent.

19. That due to the failures of Respondent to follow the January 2003 IEP and Respondent's refusal to include the services for Student requested by his parents since September of 2002, Student's parents have incurred expenses for private speech therapy and occupational therapy services for Student.

20. That the Respondent's failure to provide to Student a FAPE has resulted in the removal of Student from the Respondent's school district and his enrollment in a private educational facility by his parents; this has caused Student's parents to incur expenses for Student's education.

21. That the proposed remedies sought by Student are as follows:

    a. Reimbursement to Student's parents for all private occupational therapy sessions provided for Student since October of 2002.

    b. Reimbursement to Student's parents for all private speech therapy sessions provided for Student since October of 2002.

    c. Reimbursement to Student's parents for all private school cost incurred for educating Student since October of 2002.

    d. Reimbursement to Student's parents for all attorney fees and cost incurred in bringing this action against Respondent."

II. Procedural History and Time Line Information

On January 22nd, 2004, the Parents, through their attorney, request requested a due process hearing from the Missouri Department of Elementary and Secondary Education (DESE).

The request for the due process hearing was received by DESE on January 23, 2004.

On February 4, 2004, Pam Williams, Director for Special Education Compliance at DESE, notified the chairperson of assignment to serve on the due process hearing panel to hear the parents' claims.

On February 5, 2004, the Chairperson informed the parties, via letter, that a hearing must be held and a written decision rendered on or before March 8, 2004. The Chairperson requested, in that letter, that the parties inform the Panel by February 12, 2004: how long they would need to present their respective cases; any special accommodations that were needed; any dates the parties were not available for a hearing between February 18th, 2004 and February 25th, 2004; and whether the parties desired to hold a pre-hearing conference to discuss problems or hear motions regarding the issues in the case.

On February 23, 2004, the Chairperson issued an Order granting the joint request to extend the statutory time lines such that the due process hearing would be held on April 20th through the 22nd, 2004, with a date of decision of May 7th, 2004. That Order further set March 9th, 2004, as the deadline for Petitioner to submit an Amended Statement of Issues. On March 9th, 2004, Petitioner submitted his Amended Statement of Issues.

On March 18th, 2004, Chairperson issued an Order granting the joint request of the parties such that the deadline for all Motions to be filed in the matter shall be April 15, 2004.

On April 15th, 2004, Respondent submitted its Motion to Dismiss Due Process Request.

On April 16th, 2004, Petitioner submitted Petitioner's Motion to Deny Respondent's Motion to Dismiss Petitioner's Due Process Request. On April 16th, 2004, Respondent submitted is Motion In Limine seeking to exclude or limit testimony of certain witnesses.

The due process hearing convened at 9:00 a.m. on April 20th, 2004. The due process hearing adjourned at 3:30 p.m. on April 22nd, 2004.

At the conclusion of the due process hearing the parties made a joint motion that they have until Friday, May 28th, 2004, to submit proposed findings of fact and conclusion of law and briefs in support and that a final decision in this case be rendered by Friday, June 11, 2004.

The parties submitted their findings of fact and conclusions of law and briefs in support on May 28th, 2004.

On June 1, 2004, the Respondent submitted a Motion to Strike Petitioner's Statement of Facts.

III. Findings of Fact

The hearing panel makes the following findings of fact:

1. Student (DOB:) (hereinafter "Student") is a four-year-old boy who, following his third birthday () (Ex. R-59) until approximately September 2003 (Tr. 148, 150, 305), was enrolled in the Northwest R-I School District's ("District") Early Childhood Special Education Program ("ECSE"). The ECSE program is administered by the Special Services Cooperative of Jefferson County ("Co-Op"). In late summer 2003, the Parents removed Student from the Northwest R-1 School District and unilaterally enrolled him in a private setting. (Tr. 147-150).
2. Sometime after August 16 or 17, 2003, the Parents decided to withdraw Student from the Co-Op and unilaterally and voluntarily placed Student at a private full time day care facility. (Tr. 305) From September 2003 until at least April 2004, Student attended the day care program at Howard Park, a private day-care facility. (Tr.148).
3. On January 22, 2004, the Parents, though their attorney, requested a due process hearing from the Missouri Department of Elementary and Secondary Education ("DESE"). The Parents' January 22, 2004 due process request alleged that the District failed to provide Student a free

appropriate public education ("FAPE") pursuant to the Individuals With Disabilities Education Act, 20 U.S.C § 1400, et. seq., ("IDEA") during the 2002-2003 school year. The Parents' initial due process request alleged, generally, that the District had failed to provide Student a FAPE because Student's Individual Education Plan ("IEP") team refused to adopt recommendations from Student's neurologist, and, also failed to implement Student's IEP as written.

4. On March 9, 2004, Student's counsel filed an Amended Statement of Issues specifying the issues for the three-member panel's determination as follows:

Failure to incorporate recommendations of Student's therapists in the September, 2002 Individualized Education Plan ("IEP").

Failure to adopt recommendations pertaining to occupational therapy from Student's neurologist in January, 2003.

Failure to modify or change Student's January, 2003 IEP to incorporate recommendations from Student's private occupational therapists.

Failure to conduct an occupational therapy evaluation prior to April, 2003. Failure to develop an occupational therapy plan for Student prior to April, 2003.

Failure to provide occupational therapy consultation services as called for by Student's IEP.

Failure to provide speech therapy as set forth in Student's IEP.

Failure to provide the full 720 minutes of special education and related services called for by Student's IEP after January, 2003.

Failure to exceed to Student's parents' request to provide sign language instruction.

· Failure to provide Student with a Free Appropriate Public Education. (March 9, 2004 Amend. Stmt. of Issues).

5. This matter is now before the three-member due process hearing panel pursuant to 20U.S.C. § 1415 and RSMo. § 162.961.

6. A Due Process Hearing was held on April 20, 21 & 22, 2004. The panel continued the hearing beyond the 45-day statutory timeline at the parties' requests. The panel was comprised of Joshua Douglass, Esq. (Chairperson); Christine Montgomery (the District's hearing officer selection); and Jean Adams (the Parents' hearing officer selection). Petitioner was represented by Attorney Lawrence Altman, and the District was represented by Attorney Ernest G. Trakas. Each party had the opportunity to call and cross-examine witnesses. Witnesses were sequestered and the hearing was closed at Petitioner's election. A court reporter was present and made a full record of the proceedings. Respondent's exhibits R-24, R-26-28, R-30-31, R-34-37, R-39, R-41, R-43-45, R-47, R-49-50, R-53-54, R-58, and R-66 were admitted without objection of Petitioner's counsel. At the hearing, Petitioner sought to admit numerous documents as one exhibit. However, because Petitioner's submission contained many separate documents from different authors and institutions without designation or delineation, Respondent's counsel objected to the admission of Petitioner's document book. Moreover, during the hearing, Petitioner's counsel referred to page numbers in Petitioner's document book in lieu of specific exhibits. At the conclusion of the hearing, Petitioner was ordered to reconfigure his document book and identify separate exhibits. In addition, counsel for Respondent objected to the admission of the following page references in Petitioner's document book: JINK 000110-000114, 000031-000032, 000076, 000077, and 000080.

7. The following individuals testified at the hearing on behalf of Petitioner: Petitioner's mother; Rebecca Ware, Petitioner's developmental therapist and baby sitter; Emily Schiltz, Petitioner's private speech therapist; Diana Evers, Petitioner's private occupational therapist (admitted as a

witness over Respondent's objection). The following individuals testified on behalf of Respondent: Julie Leftwich, Director of the Jefferson County Special Services Cooperative; and Becky Mueller, District speech/language pathologist.

8. At the time of Student's enrollment in the District he had an educational diagnosis of a Young Child with Developmental Delay ("DD"), and a medical diagnosis of Autism Spectrum Disorder. (Ex. R-24).

9. At age three, as a child with DD, Student was potentially eligible for Early Childhood Special Education ("ECSE") services offered by the District through the Co-Op. (Ex. R-1).

10. The Co-Op provides ECSE services to ten surrounding school districts, including the Northwest R-I School District, and, in that capacity, conducts comprehensive evaluations for those children who may be eligible for ECSE. (Tr. 417).

11. In late August 2002 Student was referred to the Co-Op for an initial evaluation due to concerns about his communication and his medical diagnosis. (Tr. 53). As part of Student's evaluation, the District, at the Parents' request, accepted reports of evaluations and other data compiled by Student's First Steps provider, Sensory Solutions, St. Louis Children's Hospital and other providers in the areas of cognition, communication, and hearing. In addition, the Co-Op also evaluated Student in the areas of cognition, comprehension, language and articulation. (Tr. 59; 60-64; 417-420; Ex. R-24). The Co-Op administered an autism rating scale referred to as the "GARS". The results of the GARS showed that Student had an average probability of being autistic. Julie Leftwich, the Co-Op's director, testified this indicated autism was not a major area of concern for Student. Student's mother testified that she was satisfied that the Co-Op had sufficient information to develop Student's IEP. (Tr. 238).

12. As a result of that evaluation, Student's diagnostic team concluded that Student scored within the high average and gifted range on the Leiter test of intelligence, but did show delays in the areas of articulation and expressive language. (Tr. 419-429). Based on the evaluation the team found that Student met the criteria to be diagnosed as a Young Child with a Developmental Delay, and was determined to be eligible for special education services due to significant delays in communication. (Ex. R-24).

13. In September 2002, Student's IEP team developed an initial IEP for Student (Ex. R-26). Student's Mother attended the IEP meeting accompanied by therapists and advocates of her choosing (Tr. 63; 235; 239). Student's Mother agreed with the IEP and, in fact, was satisfied with the goals and objectives developed by the IEP team. (Tr. 87; 240).

14. Using the Co-Op's evaluations and records and reports of evaluations from Student's First Steps and other providers, and in cooperation with Student's parents, Student's IEP team developed Student's initial IEP in September 2002. That IEP called for 180 minutes of special education services and 60 minutes of speech therapy services per week. (Ex. R-26).

15. One week after Student's initial IEP was finalized, Student's mother contacted Julie Leftwich, the Co-Op's Early Childhood Special Education Coordinator, and indicated that, due to her schedule, Student would not be able to attend speech therapy sessions on Fridays as called for in the IEP. In response to Student's Mothers' communication, and in an effort to accommodate her and with her agreement, the Co-Op agreed to provide the speech language services during the time designated for special education services. (Ex. R-27 and R-28; Tr. 424-426).

16. Student's initial IEP called for 60 minutes per week of speech therapy services. (Ex. R-26). However, due to conflicts with Student's Mother's schedule, and at her request, the District agreed to fold Student's speech therapy services into the time designated for special education

services. (Tr. 245; 424-426; Ex. R-27, R-28). Student's Mother acknowledged that she understood and agreed with this change. (Tr. 245).

17. Student continued to receive special education and related services consistent with the September 4, 2002 IEP until November 22, 2002. At that time, Becky Mueller, the District's speech therapist, based on her work with Student until that time, suspected that Student might have a condition known as Apraxia. (Tr. 253). Ms. Mueller contacted Student's Mother and recommended changes in Student's special education services and speech therapy. (Tr. 543). At Ms. Mueller's suggestion, Student's speech therapy services were changed from one session for 60 minutes to two sessions for 30 minutes per week. (Tr. 543-545), (Ex. R-30 & R-31). Student's Mother agreed to and was satisfied with Ms. Mueller's recommendations. (Tr. 249). Student's Mother confirmed her acceptance of the recommended changes by signing a Notice of Action evidencing same. (Tr. 99; Ex. R-31).

18. In January 2003, Student's Mother requested that the District reconvene Student's IEP team. (Tr. 127). In response to Student's Mother's request, an IEP team meeting was held on January 10, 2003. Student's Mother attended the meeting accompanied by Rebecca Ware and Kara Kirbey. (Tr. 235-237, 250-251, 267-268). In fact, Student's Mother acknowledged that she and her advocates fully participated in this and other IEPs. (Tr. 251).

19. In response to Student's Mother's requests, the IEP team met on January 10, 2003. The team decided to increase the amount of special education and related services Student would receive. Specifically, the team decided to increase the amount of special education services from 300 to 540 minutes per week, the amount of speech therapy from 60 to 120 minutes per week, and add occupational therapy consult services for 60 minutes per month (Tr. 109-113; 433-439; Ex. R-36, R-37). However, prior to the conclusion of the January 10, 2003 IEP meeting, Student's

Mother decided that she did not want the District to provide any speech therapy services called for in the revised IEP. Instead, Student's Mother decided that Student would receive all his speech therapy at Sensory Solutions (Tr. 128; 400).

20. At the January 10, 2003 IEP meeting, Student's Mother acknowledged, along with the IEP team, that Student had made progress in articulation and use of words. (Tr. 131-132; Ex. R-36).

21. At the January 10, 2003 IEP meeting, Student's IEP team determined that the amount of special education and related services he was receiving should be increased. As a result, the amount of special education services was increased as noted, and speech language therapy was increased from 60 minutes to 120 minutes per week, to be delivered in four 30-minute sessions. Finally, the team determined that Student should receive 60 minutes of occupational therapy consult services for a total of 60 minutes per month. (Tr. 435-439; Ex. R-34, R-36, R-37). While there was some confusion as to the total amount of minutes per week, due to whether or not Student was to receive 60 minutes of occupational therapy consult weekly or monthly, it is clear, based on the testimony and the exhibits, that the IEP team intended and understood that the occupational therapy consult services were to be provided for a total of 60 minutes per month. (Tr. 438-439; Ex. R-34, R-36, R-37).

22. The IEP developed on January 10, 2003 called for Student to receive 120 minutes of speech therapy services at the Co-Op. However, Student's Mother and Julie Leftwich testified that at the conclusion of that meeting, Student's Mother requested that all speech therapy services be provided at Howard Park, a private provider the Parents were also sending Student to at the time. (Tr. 127-129, 400).

23. On January 15, 2003 Student's Mother contacted Julie Leftwich. Student's Mother advised that she had changed her mind and now wanted the District to furnish the 120 minutes of speech therapy services originally called for in the January 10, 2003 IEP. In response to Student's Mother's request, Ms. Leftwich amended the January 10th IEP to reflect changes requested by Student's Mother. (Tr. 268-269; 440-441; 546; Ex. R-34, R-35, R-36, R-37 and R-39).

24. Student's IEP team met again on February 7, 2003 to review the January, 2003 revisions to Student's IEP. The team agreed that Student had made progress due to the increase in IEP minutes in special education, speech language and occupational therapy consultative services. (Tr. 127; 444). As a result, the team decided to continue the IEP as revised at the January, 2003 meeting. In addition, the team considered the results of a recent occupational therapy evaluation conducted at Howard Park as relayed by Student's Mother. Student's Mother agreed to obtain a copy of the occupational therapy evaluation and mail it to the Special Services Co-Op for inclusion in Student's file. (Tr. 446). Finally, the team considered and rejected ABA and discrete trial therapy as too restrictive in light of Student's continuing progress under the current IEP. (Tr. 446; Ex. R-41).

25. On February 21, 2003, Student's Mother again contacted Julie Leftwich and requested that the District proceed with an occupational therapy evaluation for Student. (Tr. 286-288). Student's Mother requested that the evaluation include a sensory integration component. Ms. Leftwich advised Student's Mother that the District would proceed with the requested evaluations. (Tr.451-452; Ex. R-43, R-44 and R-45).

26. The Parents claim that the District did not adopt the medical diagnosis and recommendations of Student's neurologist, Dr. Dennis Altman. (Pet. Amd. Stmt. Issues, ¶ 3, 6). However, the testimony at the hearing, as well as the records introduced into evidence, demonstrate the Co-

Op staff and Student's IEP team acknowledged Student's medical diagnosis and considered it in developing his IEPs. (Tr. 63, 67, 418, 424; Ex. P-D JINK 000001-000016; R-24, R-26).

27. There was some question as to whether or not a September 9, 2002 therapy referral from Dr. Altman was ever provided to the Co-Op. Student's Mother testified that she placed the form in Student's backpack. (Tr. 100-101, 277-280). Interestingly, when questioned on this, Student's Mother testified that the form was in Student's backpack perhaps as long as a few weeks. (280). Student's Mother's placement of the form in Student's backpack and her inability to recall how long it stayed there, belie the professed importance the Parents place on the conveyance of the form to the Co-Op.

28. The Parents rely heavily on Student's medical diagnosis, and assert that the medical diagnosis is or should be determinative of educational programming. Indeed, the Parents' case was replete with references to medical diagnosis. (Tr. 51, 91, 99-101, 123-125, 314-315).

29. The Parents' reliance on Dr. Altman's medical diagnosis is misplaced. Julie Leftwich testified that while information regarding Student's medical diagnosis was useful, it was not necessary in developing his IEP. (Tr. 489-492). Ms. Leftwich went on to explain that Student's individual characteristics, cognitive and developmental needs, pre-academic skills, motor skills, sensory, socialization and daily living needs are of primary importance, not the medical diagnosis, in developing educational programming. (Tr. 534).

30. The Panel finds that the Co-Op properly considered Student's medical diagnosis, and accorded it an appropriate weight in developing his IEP. The Panel also finds that Student's IEPs were appropriate, adequately addressed his needs and were reasonably calculated to confer educational benefit. In other words, Student's 2002-2003 IEPs provided him with a FAPE.

31. The Parents also assert that the District failed to conduct the occupational therapy evaluation in a timely manner after having agreed to do so in February 2003. (Tr. 134; Amended Statement of Issues, March 9, 2004).

32. In response to the Parents' request, Julie Leftwich advised Student's Mother that the District would perform the requested evaluation. (Tr. 134; 447-448). The District proceeded with the occupational therapy evaluation on Student's Mother's oral authorization and her assurance that she would sign and return written authorization for the evaluation to proceed. (Tr. 282; 286-288; 449-456).

33. Despite Student's Mother's assurances, Julie Leftwich testified that she did not receive the signed authorization back from Student's Mother until the week of June 3, 2003. (Tr. 452; Ex. R-50).

34. Ms. Leftwich also testified that she made several attempts to contact Student's Mother and secure the return of the authorizations prior to June 2003. (Tr. 451; 453; Ex. R-43; Ex. R-49).

35. Despite the lack of written authorization to proceed, Ms. Leftwich testified that the District proceeded with the occupational therapy evaluation shortly after Student's Mother gave her oral authorization on February 21, 2003. (Tr. 454).

36. The occupational therapy evaluation that the District conducted in February and March 2003 was administered by Amber Enlow. (Tr. 454, 457; Ex. R-47).

37. The Notice of Action and evaluation plan evidencing the District's agreement to proceed with the occupational therapy evaluation in February 2003 both indicate that the evaluation is to assess sensory integration and skills. (Ex. R-44; R-45).

38. The report of occupational therapy evaluation does not indicate that a sensory integration component was included as part of the evaluation. (Tr. 460-461; Ex. R-47).

39. A copy of the occupational therapy evaluation report was mailed to Student Parent's parents on June 5, 2003 by Julie Leftwich, ECSE Coordinator. (Tr. 461; Ex. R-53).

40. Despite requiring a sensory integration component, the occupational therapy evaluation report prepared by Amber Enlow in April of 2003 did not include the required sensory integration component. (Ex. R-47). Moreover, Julie Leftwich conceded that the sensory integration component was not done and that the District failed in its agreement to include that component in that evaluation. (Tr. 461).

41. The Parents also claim that the District failed to provide occupational therapy consult services as called for in the January and February 2003 IEPs. The substance of these allegations rests on Student's Mother's assumption that because she did not receive any documentation from the District relating to these services, they did not occur. (Tr. 271-272). However, testimony from Petitioner's own witnesses does not support this contention. Diana Evers testified that in January 2003 the provision of OTC by the Co-Op was appropriate. (Tr. 187-190, 192-193, 196). Rebecca Ware testified that she was impressed with Student's classroom teacher in advising Student's sensory need. (Tr. 411).

42. Student's Mother's testimony that her contention is based on her assumption that the OTC wasn't provided when viewed with Diana Evers' and Rebecca Ware's testimony, it seems clear that the inclusion of occupational therapy consult services to Student's IEP in January 2003 was appropriate, and were provided.

43. The Parents also claim that Student required direct occupational therapy services. Petitioner's own witnesses do not support his contention that Student required direct occupational therapy services. The Parents called Diana Evers, their private occupational therapist. Ms. Evers provided occupational therapy services to Student at Howard Park 60 minutes per week. (Tr.

196). In addition, Ms. Evers prepared an occupational therapy evaluation in January 2003 at the Parents' request. (Ex. P-E, JINK 80; Ex. R-68). Ms. Evers testified that her evaluation supported the amount of occupational therapy she was already providing Student. (Tr. 195-196). In fact, Ms. Evers testified that the Parents did not ask her to prepare her evaluation for use by the District, and that Student's Mother had never authorized her to release the report of her evaluation to the District or for her to contact the District. (Tr. 195; 213). Ms. Evers went on to testify that at the time she conducted her evaluation and prepared her report, it was appropriate for the District to provide occupational therapy consult services at the Co-Op. (Tr. 196). In fact, Ms. Evers went on to testify that the techniques contained in the sensory diet prepared by the District for use by Student's classroom teacher contained appropriate techniques in addressing Student's sensory needs. (Tr. 202-203). In addition, Rebecca Ware, Student's developmental therapist testified that she was impressed with the efforts of the classroom teacher in addressing Student's sensory needs. (Tr. 411).

44. In light of Diana Evers' and Rebecca Ware's testimony, it seems clear that Student did not require direct occupational therapy in addition to what Diana Evers was already providing, and that the provision of occupational therapy consult services in January 2003 was appropriate.

45. The Parents also allege that the Co-Op failed to provide one-on-one speech therapy services four times per week. (Tr. 125; 143). The Parents base these allegations on a professed, oral understanding between Student's Mother; Emily Schiltz, the Parents' private speech therapist; and Becky Mueller, the Co-Op's speech therapist. Student's Mother and Ms. Schiltz maintained that this agreement was reached at the February 7, 2003 IEP meeting. (Tr. 144, 334-338).

46. Student's Mother testified that she assumed that there was an understanding to this effect based on this professed agreement. (Tr. 254-256). Ms. Emily Schiltz admitted that it was only her impression that an agreement had been reached concerning the provision of one-on-one speech therapy services. (Tr. 376). Ms. Schiltz also testified that the provision of one-on-one speech therapies would constitute the best practice. A level of service the District is not obligated to provide. (Tr. 364-365). Emily Schiltz's testimony is troubling because she admitted she has never read Student's IEP at any time, nor has she ever reviewed the goals and objectives relating to speech. (Tr. 359-360). This is from the very witness the Parents rely on to impune the services provided by the Co-Op, and to establish the existence of an agreement to provide one-on-one speech therapy.

47. Julie Leftwich and Becky Mueller both denied the existence of any such agreement pertaining to the provision of one-on-one services. (Tr. 440, 548). In fact, Becky Mueller testified that she has been a speech therapist for 14 years, and that she is involved in the development of 50-60 IEPs per year. Ms. Mueller went on to state that throughout her entire career she has never made an agreement to perform therapies not specifically called for by the IEP. (Tr. 548-549). Ms. Mueller also testified that in the development of over 500 IEPs, she has never been involved in the development or implementation of an IEP that called for one-on-one speech therapy services. (Tr. 548-549). Most telling of all is the fact that neither the IEP itself, nor any of the supporting documents, contain any reference to the alleged one-on-one speech therapy. (Ex. R-34, R-35, R-36-, R-37 and R-39). It is clear, and the Panel finds, that the IEP team did not agree to provide nor did the IEP require the provision of one-on-one speech therapy services.

48. The Parents also allege that the Co-Op did not provide a FAPE because it did not provide Student with sign language instruction from an instructor trained in sign language. (Pet. Amend. Stmt. Issue, ¶ 17-18, March 9, 2003). Here again, the testimony adduced at hearing does not support the Parents' contention. To begin with, Student's Mother admitted that she did not and was not requesting sign language instruction. (Tr. 301-302). Similarly, Emily Schiltz and Rebecca Ware, both witnesses called by the Parents, testified that neither sign language instruction nor an instructor trained in sign language were necessary. (Tr. 369-370, 378, 408-409). Indeed, Emily Schiltz acknowledged that Becky Mueller, the Co-Op's speech therapist, is qualified to provide sign labeling instruction. (Tr. 370).

49. The Panel finds that Student did not require sign language instruction. The Panel also finds that the Parents' allegations relating to the failure to provide these services are without merit.

50. In order for the Parents to succeed on their allegations, they must show that the 2002-2003 IEPs were inappropriate. To do so, the Parents must establish that Student failed to make progress under the IEPs. The testimony at hearing does not support that conclusion. To begin with, Student's Mother herself acknowledged that the IEP team, of which she was a part, agreed that Student had made some progress as a result of the increase in minutes in January and February 2003 (Tr. 131). In addition, Student's Mother also testified that Student made progress under the special education services portion of his IEPs. (Tr. 303-304). Moreover, in the area of speech where the Parents claim Student did not make progress, Student's Mother acknowledged that she could not determine if Student's lack of progress was due to Emily Schiltz (the Parents' private speech therapist), Becky Mueller (the District's speech therapist) or Student's level of deficit. (Tr. 304-305).

51. Similarly, Emily Schiltz, Student's private speech therapist, testified that by May of 2003 Student had made progress with his speech therapy. (Tr. 367). Likewise, Rebecca Ware, the Parents' private developmental therapist, testified that Student had success with the sensory techniques utilized by his classroom teacher in 2003. (Tr. 411-412).

52. Documentary evidence introduced by Respondent also supports the fact that Student made progress under the IEP. (Ex. R-75). Becky Mueller testified that progress on goals and objectives contained in the IEP is recorded on the student progress report and evaluation of goals pages included as part of the IEP. (Tr. 551-552; Ex. R-75). Becky Mueller went on to testify that the progress reports and evaluation of goals demonstrated that Student made consistent progress on the goals and objectives included in his IEPs throughout the 2002-2003 school year. (Tr. 553-557).

53. The testimony of the witnesses and the documentary evidence support the fact that Student made progress under the 2002-2003 IEPs.

54. It is clear that the Parents were provided ample opportunity and did, in fact, fully participate in the development of Student's IEPs. Student's Mother attended every IEP meeting throughout the course of the 2002-2003 school year. In addition, she testified that she was free to bring therapists, advocates and other individuals to assist her at each IEP meeting. (Tr. 55; 236-237; 250-251). In fact, as noted, Student's Mother testified that she and her advocates were able to fully participate in the IEP meetings. (Tr. 251).

55. While Student's Mother testified that an IEP was "enough" (Tr. 87); or that she was "not entirely happy" with the IEP (Tr. 125); or that she was disappointed with the IEP (Tr. 149); or that she never told the District she was happy with the IEP (Tr. 152), she went on to testify that she never rejected the initial IEP of September 2002 (Tr. 241); the November 22, 2002 increase

in services (Tr. 249); the January 15, 2003 IEP (Tr. 269); or the February 7, 2003 IEP. (Tr. 270). Student's Mother went on to testify that she never rejected any of the IEPs developed throughout the school year. (Tr. 273-274; 310).

56. Because the Parents never rejected any of the IEPs, they are required to furnish written notification to the District prior to the unilateral withdrawal and private placement of Student. Here again, the Parents failed to meet their burden. Student's Mother testified that in August she had conversations with Linda Werner, Student's case manager for the District, and Dr. Paul Bauer, the District's Director of Special Education Services. These conversations were directed primarily to the District's refusal to transport Student outside of the District at the end of the school day. (Tr. 306-308). At no time did Student's Mother indicate to either Ms. Werner or Dr. Bauer that she intended to enroll Student in a private setting. Moreover, Student's Mother acknowledged that neither of these conversations constituted an IEP meeting. (Tr. 308). Student's Mother admitted that she never sent written notification to Dr. Bauer or Ms. Werner advising the District that she was not returning Student to the Co-Op or placing him in a private setting. (Tr. 309-310).

57. Finally, and most telling, Student's Mother testified that but for the District's refusal to transport Student outside the District, she would have continued Student's placement at the Co-Op and willingly attended an IEP at the beginning of the 2004-2005 school year. (Tr. 308). This admission by Student's Mother belies any contention that she was either dissatisfied with the IEPs or that the District denied Student a FAPE.

58. The sole relief sought by the Parents is reimbursement for the expenses incurred for day care and private therapies at Howard Park and Sensory Solutions. (Pet. Amend. Stmt. Issues, March 9, 2004).

59. The Parents failed to produce any evidence that they have expended any personal funds or are out of pocket any monies for these services. In fact, Student's Mother testified that they are not out of pocket any monies for these services. (Tr. 146). In addition, Student's Mother testified that the cost for the private therapies and Howard Park tuition has been paid by Medicaid and private insurance. (Tr. 126, 230-232). Finally, Student's Mother admitted that she does not know how much, if anything, the Parents are out of pocket for these services. (Tr. 233). Likewise, none of the documents the Parents introduced demonstrate any direct billing to, or payment by the Parents for these services. In fact, Student's Mother's testimony is to the contrary. (Tr. 126; 230-233).

IV. Conclusion of Law

Under the Individuals with Disabilities Education Act, all children with disabilities are entitled to a free appropriate public education designed to meet their unique needs. 20 U.S.C. § 1412. Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 189, 195 (1982), and does not require "strict equality of opportunity or services." *Id.* at 198. Rather, a local educational agency fulfills the requirement of FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

The primary vehicle for carrying out the IDEA's goals is the "individualized educational program" ("IEP"). 20 U.S.C. § 1414. Significantly, the IEP is not required to maximize the educational benefit to the child, nor to provide each and every service and accommodation which could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199. Although an

educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 459 (6th Cir. 1993), *cert. denied*, 128 L.Ed.2d 665 (1994), as stated by the *Rowley* Court, an appropriate educational program is one which is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. Thus, in articulating the standard for FAPE, the *Rowley* Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." *Id.* at 192. The Court concluded that Congress' intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.*; *See also Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (finding that IDEA does not require a school district to maximize a student's potential or provide best education possible); *Gill v. Columbia 93 Sch. Dist.*, No. 99-3807 (8th Cir. July 10, 2000) (holding that Missouri requires an appropriate and not a maximizing standard).

With this definition, the Act defines a free appropriate public education ("FAPE") in broad, general terms, without dictating substantive educational policy or mandating specific educational methods. This imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided – with state and local officials." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989) (citing *Rowley*, 458 U.S. at 207)). Second, Congress sought to bring children with disabilities into the mainstream of public school system. *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley,* 458 U.S. at 189.

The FAPE required by the Act is tailored to the unique needs of the disabled child by means of an "individualized education program" ("IEP"). 20 U.S.C. § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's

teacher, the child's parents or guardian, and where appropriate, the child, consists of a written document containing:

> (A) a statement of the present levels of educational performance of such child;
>
> (B) a statement of annual goals, including short-term instructional objectives;
>
> (C) a statement of the specific educational services to be provided to such child, and the extent to which the child will be able to participate in regular educational programs;
>
> (D) the projected date for initiation and anticipated duration of such services; and
>
> (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401. Local educational agencies must review, and where appropriate, revise each child's IEP at least annually when the child remains within the jurisdiction of that public agency. 20 U.S.C. § 1414(a)(5).

Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Rowley*, 458 U.S. at 189, 195, *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 611-12 (8th Cir. 1997), and does not require "strict equality of opportunity or services." *Rowley*, 458 U.S. at 198; *Clynes*, 119 F.3d at 612. Rather, a local educational agency fulfills the requirement of providing a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203; *Clynes*, 119 F.3d at 612. Moreover, a critical factor in determining whether a student has received FAPE is whether the student is progressing. *Rowley*, 458 U.S. at 203-04.

Further, the program provided by the IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could

conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Clynes*, 119 F.3d at 612. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 459 (6th Cir. 1993), an appropriate educational program is one that is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. *See also Clynes*, 119 F.3d at 611. In articulating the standard for FAPE, the *Rowley* Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." 458 U.S. at 192. The Court found Congress's intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.*

Given this purpose, the IDEA defines a FAPE in broad, general terms, without dictating substantive educational policy mandating specific educational methods. The imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided – with state and local officials." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). Second, Congress sought to bring children with disabilities into the mainstream of the public school system. *Mark A. v. Grant Wood Area Education Agency,* 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189. Thus, federal law requires that states educate disabled and non-disabled children to "the maximum extent appropriate." 20 U.S.C. § 1412.

The key inquiry in determining whether a district is providing FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). As stated by one court:

> The IDEA does not promise perfect solutions to the vexing problems posed by the

> existence of learning disabilities in children and adolescents. The Act sets more modest goals; it emphasizes appropriate, rather than an ideal education; it requires an adequate, rather than an optimal IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993) (citing *Rowley*, 453 U.S. at 198).

Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1035, 1040 (3d Cir. 1993). As noted by the *Fuhrmann* court, "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." 993 F.2d at 1040. Therefore, "events occurring months and years after the placement decisions had been promulgated, although arguably relevant to the court's inquiry, cannot be substituted for Rowley's threshold determination of a 'reasonable calculation' of educational benefit. Therefore, evidence of a student's later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit." *Id.*

I. THE 2002-2003 IEP(S) WERE REASONABLY CALCULATED TO, AND DID, PROVIDE STUDENT WITH EDUCATIONAL BENEFIT IN THE LEAST RESTRICTIVE ENVIRONMENT.

In determining whether an IEP is adequate, the Panel must first determine whether the District complied with IDEA procedures, including whether the IEP conformed with the IDEA's requirements. Second, the Panel must determine whether the IEP was reasonably calculated to enable Student to receive educational benefit. *See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist.,* 28 IDELR 177 (10th Cir. May 19, 1998). The sufficiency of an IEP is a question of law. *Logue v.*

Shawnee Mission Public Sch. Unified Sch. Dist., 959 F. Supp. 1338, 1348 n. 7 *(*D. Ks. 1*997).* Notably, technical deviations do not render an IEP invalid*. Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556 (8th Cir. 1996). "[T]o hold otherwise would 'exalt form over substance.'" *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 199). The *Rowley* Court explained this reasoning as follows:

> the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 348 U.S. at 206.

Indeed, the Eighth Circuit Court of Appeals has spoken to this precise issue by stating that "[a]n IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Independent Sch. Dist.*, 88 F.3d at 562. *See also Urban v Jefferson County Sch. Dist.*, 89 F.3d 720, 726 (10th Cir. 1996) (holding that a deficient IEP "did not amount to a denial of an appropriate education").

In the instant case, the Panel concludes that the District provided Student with a FAPE in the least restrictive environment during the 2002-2003 school year. The evidence at hearing conclusively established that the 2002-2003 IEPs contained all the requisite components enumerated in the IDEA. It is undisputed that the District convened a diagnostic staffing followed by an IEP team meeting. The IEP team included Student's Mother, advocates and therapists of her choosing. At the IEP meetings, the IEP team reviewed existing and current assessment data, including: 1) current evaluation information, including speech-language, audiological, cognitive, comprehension, occupational, developmental and physical therapy evaluations; 2) Medical records

and assessments; 3) information from Student's teachers and therapists; 4) information from Student's parents including information related to Student's medical diagnosis of Autism Spectrum Disorder. Student's Mother was present at every IEP team meeting and actively participated in team discussions and decisions. In addition, the IEP contained goals and objectives, supplementary aides and services and modifications in all identified areas of disability, and each of these components was appropriately tailored to meet Student's individualized needs. More significantly, the IDEA requires goals and objectives or related services in speech, language, occupational therapy and social skills for certain students, the evidence at hearing established that these were adequately addressed and, thus, Student's IEP appropriately addressed these areas.

More importantly, the Panel finds that the 2002-2003 IEPs provided FAPE at all times during the school year. Student's progress reports and evaluation of goals for the 2002-2003 school year demonstrate that Student, in fact, made progress and received a great deal more than trivial educational benefit. Significantly, Student's Mother, Emily Schlitz and Becky Mueller all testified that Student made progress during the school year.

Contrary to Petitioners' assertion, Student's 2002-2003 IEPs contained appropriate speech and occupational therapy goals and objectives, and it was appropriate for the team to concentrate on Student's speech and occupational therapy needs using the delivery models and frequency contained in the IEP in light of Student's age. Moreover, the evidence at hearing demonstrated that, beginning in January 2003, Student received occupational therapy consult services as called for by the IEP. Indeed, Petitioners provided no evidence to support their contention that Student did not receive occupational therapy consult services. The only evidence adduced by Petitioners was Student's Mother's belief that because she did not receive additional documentation the services

were not provided. The Panel finds that the District provided the occupational therapy services as outlined in the January and February 2003 modifications to Student's IEP. .

The Panel also finds that the team's decision in January 2003 to furnish occupational therapy consult services as a service delivery model for Student's occupational therapy needs was well supported by the evidence. First and foremost, the August 2002 Initial Evaluation and Diagnostic Summary demonstrated that Student qualified for special education services due to delays in communication. The evaluation did not support the provision of occupational therapy services. Significantly, Student's Mother did not dispute the diagnostic conclusion at that time. In January 2003, at Student's Mother's urging, occupational therapy consult services were added to Student's IEP. In addition, in January 2003, Student's Mother requested an occupational therapy evaluation from Howard Park, Student's private day care center. Diana Evers, Student's Howard Park occupational therapist, performed the evaluation and determined that Student was receiving the appropriate level of direct occupational therapy from her at Howard Park. In fact, Ms. Evers testified, based on her evaluation, the District's provision of occupational consult services in January 2003 was appropriate. The Panel agrees with that conclusion and notes that evaluations and therapists' observations are among the types of data that can be used as the basis for determining a service delivery model. More significantly, the IEP team did not ignore Student's Mother's concerns or Student's needs at that time. The team merely determined that those needs could be better served by the provision of occupational therapy consult services.

The Panel also rejects Petitioners' contentions with respect to the failure to provide one-on-one speech therapy following the January 2003 IEP meeting. As a threshold matter, the Panel notes that Petitioners failed to adduce any credible evidence that the IEP team ever intended, let alone, agreed to provide one-on-one speech therapy services at any time. Petitioners' contention is based

on an alleged oral agreement between Student's Mother, Emily Schiltz (Student's private speech therapist) and Becky Mueller, the District's speech therapist. The Panel finds that there is insufficient credible evidence to conclude that such an agreement was ever reached. Both Becky Mueller and Julie Leftwich denied the existence of such an agreement. Moreover, Ms. Mueller testified that in more than fourteen years as a speech therapist she had never reached such an agreement or provided such services not specifically called for by the IEP. What is clear, however, is that both the January and February 2003 IEPs call for the provisions of speech therapy in four 30-minute sessions for a total of 120 minutes per week. Nowhere does the IEP state that these services are to be provided in a one-on-one setting. The Panel finds that the District delivered the speech therapy services as called for in the IEP, and provided Student with a FAPE.

The Panel finds that the Parents' allegation that the IEP team had agreed to provide one-on-one speech therapy services following the January 2003 IEP meeting is without merit. The IEP team's specification of speech/language therapy for 30 minutes, four times per week was all that was called for and anticipated by the IEP. The Panel concludes that Student received educational benefit from the speech language provisions of the IEP. (Tr. 131, 303-304, 367, 411-412, 551-552; Ex. R-75). More specifically, as explained at hearing, Student's greatest deficiency was in the area of communication and the IEPs appropriately addressed that area of educational need. (Tr. 67, 420-424, 428, 543-544; Ex. R-24, R-26, R-30, R-31, R-34, R-36, R-37). Finally and most importantly, Student in fact received speech and language therapy 30 minutes per day for four days each week. (Tr. 543-547, 551-573).

The 2002-2003 IEP complied with the IDEA, the Missouri State Plan and the relevant federal regulations. Student received educational benefit as a result of the implementation of the IEP. More specifically, the IEP addressed Student's needs in the areas of cognition,

comprehension, socialization, speech and language, and also offered a placement in which Student could interact with non-disabled peers with normal speech and language development. Moreover, the evidence at hearing established that the staff of the Co-Op were not only properly certificated and/or licensed, but were fully qualified to address Student's special education and related needs. Furthermore, the Co-Op staff demonstrated their willingness to obtain whatever additional materials and/or training might be helpful in this. Indeed, Petitioners' own developmental therapist, Rebecca Ware, praised the efforts of Student's classroom teacher in this regard. (Tr. 411). Student also made progress during the school year. Student's Mother acknowledged he made progress. (Tr. 303-304). Student's IEP team also acknowledged that he made progress. (Tr. 367, 411-412, 551-552). Accordingly, because the District developed, offered and implemented an IEP and placement that were reasonably calculated to provide educational benefit, the Panel finds that the District offered and provided Student a FAPE throughout the 2002-2003 school year. Accordingly, the Parents' claim for reimbursement must be denied on that basis alone.

Furthermore, assuming any technical violations occurred as a result of the January or February IEP meetings, such technical deviations were not sufficient to justify a finding of a denial of FAPE in this case. *See, e.g., Blackmon v. Springfield R-XII Sch.* Dist., 198 F.3d 648 (8th Cir. 1999), *reh'g en banc and reh'g denied*, 2000 U.S. App. LEXIS 965 (Jan. 25, 2000), *Independent Sch. Dist. v. S.D.*, 88 F.3d 556, 557 (8th Cir. 1996); *Evans v. District No. 17 of Douglas County, Neb.*, 841 F.2d 824, 825 (8th Cir. 1998). Rather, as stated by the Eighth Circuit, "an IEP should be set aside only if 'procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'" *Independent Sch. Dist.*, 88 F.3d at 562 (holding that parents' request for reimbursement for private school should be denied because "[t]he procedural

and technical deficiencies in the IEPs that were identified" were either harmless or could be remedied by relief other than reimbursement).

In this case, the Panel concludes that any technical violation that may have occurred in amending the IEP, or in the computation of the number of minutes Student was to receive speech therapy or occupational therapy consult services ("OTC") falls within the category of a de minimis violation. This is particularly so because Student's Mother was an active participant in every IEP meeting, was provided copies of all the January and February 2003 IEP amendments, Notices of Action and Conference Summaries, all of which indicated that the OTC services were to be provided for 60 minutes per month. If Student's Mother was confused about the amount of OTC her son was to receive she never said so.

Finally, the Panel reaches this same conclusion based on the testimony of Julie Leftwich that Student's Mother requested changes in the schedule and provision of services under the IEPs to convenience her schedule. Student's Mother repeatedly requested changes to the IEPs after team meetings (Tr. 424-427; 440).

Accordingly, the Panel now concludes that the 2003-03 IEPs were reasonably calculated to provide Student with educational benefit, and did so.

II. THE PARENTS ARE NOT ENTITLED TO REIMBURSEMENT FOR THE TUITION AND COSTS ASSOCIATED WITH THE UNILATERAL WITHDRAWAL AND PLACEMENT OF STUDENT IN A PRIVATE SETTING.

Obviously, the law does not require parents to keep their child in a program they feel is inappropriate. However, the IDEA does "operate in such a way that parents who unilaterally change their child's placement during the pendency of the review proceedings, without the consent of State and local officials, do so at their own financial risk." *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373-75 (1985). *See also* Clynes, 119 F.3d at 611-12. Reimbursement,

however, is proper only if the IEP is determined to be inappropriate and the parents' placement is determined to be appropriate. *Burlington*, 471 U.S. at 370. *See Blackmon*, at 198 F.3d 648 (8th Cir. 1999) (in order to obtain reimbursement for a private program, the parents must demonstrate that "(1) the School district's proposed IEP would not have provided [the student] with a free appropriate public education; and (2) the [private program] complied with the IDEA."). Otherwise, the costs do not shift and the parents must bear the costs of the private placement. *Id.*; *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Significantly, "[e]quitable considerations are relevant in fashioning relief" in such cases. *Florence County*, 114 S. Ct. at 365.

Several cases decided in the past at various levels of review are particularly instructive with regard to the instant case. For example, in *Capistrano Unified Sch. Dist.*, the hearing officer held that the district's proposed program would provide educational benefit to a three-year-old student with a hearing impairment and a cochlear implant. 3 ECLPR 211 (SEA Calif. March 3, 1998). The district proposed placing the student in a preschool class taught by a certified special education teacher who was assisted by an aide. The parents rejected the proposed placement and sought placement in a private school. In rejecting the parents' request for a private school, the hearing officer concluded that the district staff was capable of monitoring and maintaining the student's cochlear implant and meeting his educational needs. In response to parental concerns about the district's ability to monitor the cochlear implant, the hearing officer found that the district's staff "could be trained to do the basic functional monitoring that would be expected from the classroom teacher . . . . The Hearing Officer also finds that the professionals with whom the teachers would consult in the event of problems . . . have the basic knowledge necessary to service STUDENT and should be able to learn how to monitor and operate his implant. The service providers working with STUDENT at [the private school] may have more experience, but *the District is not obligated to*

provide the best services available." *Id.* (emphasis added).

Likewise, in *Doe v. Bd. of Educ. of Tullahoma City Schls*., the Sixth Circuit affirmed the decisions of the administrative law judge and the district court denying reimbursement to the parents of a disabled student who was unilaterally placed at a private school for children with disabilities. 9 F.3d 455, 456 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994). During the IEP process, the parents continued to insist that the private school offered the only appropriate placement for their child. *Id.* at 456-57. Based on the information available to it, however, the IEP team recommended a regular education placement with special education services. *Id.*

In concluding that the district's IEP was reasonably calculated to enable the child to receive some educational benefit, the court noted that the IEP addressed the student's particular disabilities. *Id.* at 459. The court further determined that even if the private placement could provide services superior to those offered by the public school, the IDEA did not mandate a placement there. *Id.* at 459. Finally, the court concluded that the private placement offered a more restrictive setting. This is exactly the concern raised by Rebecca Ware, the Parents' developmental therapist, about Student's continued placement at Howard Park. (Tr. 399). In fact, the overwhelming testimony at the hearing demonstrated that Student made progress at the Co-Op during the 2002-2003 school year. The Parents have failed to establish that Student did not benefit from placement at the Co-Op. In a similar circumstance in *Doe*, the court concluded that since the IEP developed was appropriate, placement as determined by the IEP team was appropriate and required under the IDEA. *Doe v. Bd, of Educ.,* at 460. As stated by the Court:

> While the Brehm School is certainly an appropriate and, in some respects even a superior, placement, it is clearly far more restrictive than the IEP proposed by the Board. All students at the Brehm School are learning disabled, handicapped children; that school
>
> therefore, provides a child no opportunity for educational interaction with non-handicapped

students.

Id. at 460.

A. THE PARENTS ARE NOT ENTITLED TO REIMBURSEMENT BECAUSE OF THEIR FAILURE TO TIMELY COOPERATE IN THE IEP PROCESS.

Although reimbursement for a unilateral private placement is an appropriate form of relief under the IDEA under certain conditions, such reimbursement is subject to the parents' cooperation in the IDEA's requisite procedures. *Patricia P. v Bd. of Educ. of Oak Park and River Forest High Sch. Dist. No. 200*, 203 F.3d 462 (7th Cir. 2000). Indeed, the Eighth Circuit has recognized that a parent's right to seek reimbursement for a unilateral placement is available only upon a finding that, after the parent has cooperated with the district, the district has committed serious procedural failures. *See Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 380-82 (8th Cir. 1998). Accordingly, "[w]ithout some minimal cooperation, a school district cannot conduct an evaluation of a disabled child as is contemplated under the IDEA." *Patricia P.*, 203 F.3d at 468. Thus, if the parents want the child to receive special education under the IDEA, they must allow the school to evaluate that child. *Id.* In rejecting reimbursement for such reasons, the *Schoenfeld* Court reasoned as follows:

> Reimbursement for private education costs is appropriate only when public school placement under an individual education plan (IEP) violates IDEA because a child's needs are not met. Since Parkway was denied an opportunity to formulate a plan to meet Scott's needs, it cannot be shown that it had an inadequate plan under IDEA. Reimbursement for the costs of his private placement would therefore be inappropriate because school officials were excluded from the decision and because no showing of inadequate services under IDEA can be made.
>
> Scott's unilateral withdrawal from Parkway meant there was no opportunity to modify his IEP to meet his needs for the 1992-1993 school year in public school as is preferred under IDEA and no involvement of school officials in the private placement decision. In these circumstances reimbursement for the expenses of his private education is not required even if were assumed that private placement was appropriate to meet Scott's needs.

Schoenfeld, 138 F.3d at 283.

Here, Student's Mother admitted that while she may have been disappointed with the type or level of related services offered by the Co-Op, she never rejected the IEP or any of the amendments to it. (Tr. 241, 249, 269, 273-274, 310). Likewise, Student's Mother admitted that she never notified the District, either orally or in writing, that she was withdrawing Student and placing him in a private setting. (Tr. 309-310). These steps are essential in securing a student's and his parents' entitlement to reimbursement. *See Blackmon*, 198 F.3d 648 (8th Cir. 1999) (The parents' "disillusionment upon learning that the School District recommended a different course of action angered them and they abruptly terminated the meeting before the parties could reach a resolution to their conflicting proposals. In so doing, Grace's parents truncated their own procedural right to contribute to the development of her IEP. The School District cannot be faulted for failing to engage in an open discussion with Grace's parents about alternative options for her placement, when the parents themselves refused to participate in a discussion with the School District …"). *See also Johnson v. Metro Davidson County Sch. Sys.,* 33 IDELR 59 (M.D. Tenn. Aug. 10, 2000) ("Equity prevents reimbursement of costs accrued prior to [school district] having a chance to evaluate [student] and determine what was best for her – particularly where the record does not indicate that the [parents] provided [the school] with the opportunity to educate [the student]"); *Hoffman v. East Troy Comm. S.D.,* 29 IDELR 1074 (E.D. Wis. Mar. 4, 1999) (denying reimbursement for private placement and finding no denial of FAPE because the parents only requested an evaluation after they unilaterally placed student and finding also that, even if parents were not adequately informed of their procedural rights, the evidence showed that the parents would not have agreed to the student's evaluation or placement).

Moreover, any contention by the Parents that they did not understand their rights does not change the result in this case. As noted by the Eighth Circuit in response to a similar parental

argument:

> This misunderstanding is unfortunate, however, because Grace's parents have not shown that it was caused by any wrongdoing on the part of the School District. When, as in this case, a school district provides parents with proper notice explaining the purpose of the IEP meeting, the meeting is conducted in language that the parents can understand, . . . the parents are of normal intelligence, and they do not ask questions or otherwise express their confusion about the proceedings, the school district's failure to apprehend and rectify that confusion does not constitute a violation of the IDEA's procedural requirements.

Blackmon, 198 F.3d 648.

Here, Student's Mother attended every meeting and fully participated in every decision concerning Student's evaluation, placement and educational programming. While Student's Mother may not have obtained the delivery models, levels of service or educational diagnosis she desired, the simple uncontroverted fact is she never rejected any of Student's IEPs. By failing to do so, her claims that she was concerned that Student was not receiving a FAPE ring hollow. Indeed, the Parents waited five months before requesting a due process hearing, effectively notifying the District for the first time that they were rejecting placement, enrolling Student in a private setting and were seeking reimbursement. This type of behavior is clearly contrary to what is contemplated and required by the IDEA.

B. THE PARENTS ARE NOT ENTITLED TO REIMBURSEMENT BECAUSE THEY DID NOT DILIGENTLY PURSUE THEIR RIGHTS.

Where parents unilaterally withdraw a child from a public school and absent mitigating circumstances, the parents will not be entitled to reimbursement for private school tuition for the period prior to a formal due process request. *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80 (3rd Cir. 1999). *See also Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149 (3rd Cir. 1994) (rejecting parents' claim for tuition reimbursement for 16-month period during which students were enrolled at private school before parents' request for due process and stating that "[t]he right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP. This is accomplished through the initiation of review proceedings within a reasonable time of the unilateral placement for which reimbursement is sought.").

Similarly, as noted by the administrative law judge in *Humble Indep. Sch. Dist.*, "the IDEA envisions that parents and school districts will be engaged in an interactive and collaborative process in developing an individualized educational program for their children with disabilities. It is clear that in the instant case, there existed a lack of timely cooperation and response on the part of JB's father that hindered Humble ISD's ability to timely develop JB's IEP. It is for this reason that I decline to find Humble ISD responsible for the failure of JB to have an IEP in place during the spring semester of 1998. Parents who fail to cooperate with a School District to the extent necessary to obtain relief requested and ordered, cannot later complain about procedural irregularities resulting therefrom . . ." 29 IDELR 833 (SEA Tx. Oct. 10, 1998) (although finding a procedural error occurred when IEP was not developed for 1997-98 school year, the ALJ also concluded that the procedural error did not result in denial of FAPE). *See also Bd. of Educ. of City Sch. Dist. of City of New York,* 29 IDELR 143 (SEA NY July 10, 1998) (finding that equitable

considerations did not support reimbursement for private school tuition where evidence showed that parent delayed commencing action for over one year and noting that "[p]rompt resort to the due process procedures must be made, so that school authorities have an opportunity to correct mistakes or omissions in providing children with a free appropriate public education").

Here, the Parents never rejected any of Student's IEPs and never notified the District that they were removing their child and enrolling him in a private setting. (Tr. 241, 249, 269, 270, 273-274, 306-310). In fact, the Parents never responded to communications from the District concerning Student's enrollment for the 2004-2005 school year. (Tr. 467-468; Ex. R-58). Indeed, the Parents never responded to the District's notice that it was dropping Student from its rolls. In the end, the Parents made no attempt to contact the District to resolve their complaints until they filed for Due Process on January 22, 2004, five months after they unilaterally withdrew him and placed him in a private setting.

In this case, even assuming that the District failed to have an appropriate IEP in place and even assuming that the 2002-2003 IEP failed to provide FAPE, the Panel concludes that reimbursement is not proper for the reasons articulated in *Warren G.* and the *Humble* case.

C. EVEN IF THE 2002-2003 IEP WAS NOT REASONABLY CALCULATED TO PROVIDE EDUCATIONAL BENEFIT, REIMBURSEMENT IS NOT WARRANTED BECAUSE HOWARD PARK IS NOT AN APPROPRIATE PLACEMENT.

Howard Park Is Not An Appropriate Placement Because It Is Too Restrictive.

An additional, and no less important, requirement of the IDEA is Congress' articulated preference for mainstreaming, otherwise known as educating the child in the "least restrictive environment" ("LRE"). 20 U.S.C. § 1412. Federal law requires that states educate disabled and non-disabled children together "to the maximum extent appropriate" and that "special classes,

separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* Thus, in determining whether the private placement is appropriate, "the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. If they can, then placement in the segregated school would be inappropriate under the Act." *A.W. by and through N.W. v. Northwest R-1 Sch. Dist.,* 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987). *See also Carl D. v. Special Sch. Dist. of St. Louis County*, 28 IDELR 864, 872 (E.D. Mo. 1998). In the Eighth Circuit, the mainstreaming requirement means placement in the regular public school where possible. *Evans v. District No. 17 of Douglas County,* Neb., 841 F.2d 824, 825 (8th Cir. 1988).

LRE analysis applies to private schools when reimbursement is at issue. Accordingly, courts and administrative hearing officers consistently deny reimbursement where the private placement is deemed too restrictive even where the district's IEPs do not provide FAPE. *See, e.g., Fort Smith Pub. Schs*., 29 IDELR 399 (SEA Ark. Aug. 26, 1998) (although finding that the district's IEP denied student a FAPE because it did not address his behavioral difficulties and the student made little progress, the hearing officer found that a private placement was not appropriate because it was too restrictive and the district was capable of providing the student a FAPE within the district; ALJ, therefore, ordered revisions to the IEP); *West Linn-Wilsonville Sch. Dist.,* 30 IDELR 337 (SEA Oregon April 5, 1999) (although finding that the IEP, on its face, was not reasonably calculated to confer educational benefit, administrative agency denied reimbursement for private placement because "the flaws in this IEP did not result in loss of educational opportunity . . . and she and her parents had every opportunity to participate in its development"); *Bd. of Educ. of the Avon Lake*

City Sch. Dist. v. Patrick M., 29 IDLER 1 (N.D. Ohio 1998) (denying reimbursement, *inter alia,* because private placement was too restrictive for student's needs); *Vista Unified Sch. Dist.,* 29 IDELR 507 (SEA Calif. Aug. 20, 1998) (denying reimbursement for private auditory/oral school for 4-year-old student with hearing impairment and finding private placement inappropriate because it failed to meet student's need for exposure to non-disabled peers and a placement that should include immersion in natural language environment with hearing peers); *Bd. of Educ. of City Sch. Dist. of City of New York,* 28 IDELR 643 (SEA NY March 24, 1998) (although review officer found district's IEP was inadequate because it lacked a component for improving student's speech and language skills, review officer also found proposed district program provided student with FAPE; because there was no evidence that the student would not benefit from district's proposed program and because private program was too restrictive, it was not appropriate and reimbursement was denied).

In this case, the Co-Op ECSE program was the least restrictive environment for Student in August 2003, and continues to be today. By placing him in a pre-school full time and by denying him the opportunity to interact with his non-disabled peers in a traditional school setting, the Parents have contravened Congress' expressed preference for mainstreaming. The evidence at hearing clearly established that Student is not severely disabled and that placement at Howard Park is merely convenient because it is the out-of-District day care facility the Parents requested that Student be transported to after school in August 2003. Thus, even if the 2002-2003 IEP is deemed inadequate in any way, the evidence demonstrated that Howard Park is not an appropriate placement and, therefore, reimbursement must be denied.

III. REIMBURSEMENT IS NOT APPROPRIATE BECAUSE ANY DEFICIENCIES IN THE 2002-2003 IEP COULD BE CORRECTED BY THE DISTRICT AT THE PANEL'S DIRECTION.

The Supreme Court has clarified that equitable considerations are relevant in fashioning relief in a case in which parents seek reimbursement for a private placement. Courts and administrative hearing officers, thus, frequently deny reimbursement where it is determined that any inadequacies in a district's proposed IEP can be corrected and the student can then be served in a less restrictive environment. *See, e.g., Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556 (8th Cir. 1996) (agreeing that IEP deficiencies could be remedied by relief hearing officer awarded and, therefore, denying reimbursement for private placement and further denying reimbursement because IDEA with its strong preference for education with non-disabled peers "gives rise to a presumption in favor of [the student's placement] in the public schools"); *Pomona Unified Sch. Dist.*, 30 IDELR 158 (SEA Calif. Sept. 9, 1998) (finding that district's IEPs offered FAPE with one exception and ordering district to add a special social skills program; denying parent request for costs of private school).

In this case, Student's Mother testified that as late as August 16 or 17, 2003, but for the District's refusal to transport Student out of the District (to Howard Park day-care) after school, it was her intention for Student to return to the Co-Op for the 2004-2005 school year. (Tr. 305). Moreover, she indicated that she is willing to return Student to the Co-Op. (Tr. 154).

In this case, it is clear that any deficiencies that existed could have been remedied by the District and that the District has repeatedly shown a willingness to modify its program at all times. Accordingly, the Panel denies reimbursement based on the above-referenced authority.

IV. REIMBURSEMENT IS NOT APPROPRIATE BECAUSE THE PARENTS FAILED TO PROVIDE EVIDENCE OF REIMBURSEMENT COSTS.

It is axiomatic that a plaintiff must present credible evidence of damages. *Rill v. Trautman*, 950 F. Supp. 268 (E.D. Mo. 1996). The same holds true with respect to the need to provide credible and admissible evidence regarding the parents' out of pocket expenses for the costs associated with a private placement. Thus, "[r]eimbursing private school expenses that were never incurred would not be 'appropriate relief' under the IDEA." *Yancey v. New Baltimore City Bd. of Sch. Commissioners*, 29 IDELR 219 (D. Md. Oct. 21, 1998) (granting district's motion for summary judgment with regard to appeal of administrative decision and finding that no relief in the nature of reimbursement for a private school was available to parent even if she prevailed because the parent had not expended any of her own funds to pay for the private school).

In this case, despite the District's consistently expressed position that the Parents had an obligation to present evidence of expenses and despite the Panel's and District's counsel's questioning of Student's Mother regarding whether such expense occurred, Petitioners completely failed to present any evidence that the Parents had expended any of their own funds to pay for either the placement at Howard Park or the private therapy services provided by Sensory Solutions. Moreover, Student's Mother was evasive when questioned regarding this issue and, although indicating that she had bills from Sensory Solutions and Howard Park, admitted that virtually all of the costs evidenced by that documentation has been paid by Medicaid or private health insurance. (Tr. 126, 140, 230-232). Indeed, the Parents completely failed to demonstrate that they had personally expended any funds for the private placement or services they obtained for Student. (Tr. 146, 233). The only logical inference that the Panel is able to draw from this persistent omission is that the Parents did not expend any of their own funds to pay for any of the private therapies or

placement. Further, and contrary to the Parents' contention at hearing, a mere letter from Howard Park or Sensory Solutions indicating annual tuition or costs do not constitute such evidence. As the District demonstrated at hearing, if Howard Park or Sensory Solutions submitted Medicaid claims on Student's behalf for speech and/or occupational therapy, those claims would virtually have funded the entire tuition. Moreover, Student's Mother finally conceded at the hearing that Student had received Medicaid funds. Finally, the Panel soundly rejects the Parents' contention that the District cannot access third party payments with respect to tuition. The 1997 amendments to the IDEA clearly authorize public school districts to access such outside monies in funding educational programs for disabled students. 20 U.S.C. § 1412.

Because the Parents failed to provide *any* evidence of moneys expended on their behalf, the Panel must deny reimbursement.

V. THE PARENTS ARE NOT ENTITLED TO REIMBURSEMENT BECAUSE THEY FAILED TO GIVE THE REQUISITE ADVANCE NOTICE TO THE DISTRICT.

Pursuant to the 1997 Amendments to the IDEA, parents seeking payment for the education of their child enrolled in a private school without the consent of or referral by the public school district may not receive tuition reimbursement if:

> (aa) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a free appropriate education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (bb) Ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa). . . .

20 U.S.C. § 1412(a)(10)(C)(iii) (1997).

The 1997 Amendments are consistent with well-established Eighth Circuit precedent that has always required such advance notice. *See Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988). In

Evans, the court held that when parents are seeking reimbursement for the unilateral placement of a child in a private school, the "parents must make clear to the district that they want the school district to 'initiate' a change in placement." *Id.* at 829. In that case, the court held that the parents' expressions of concern to staff members in the public school district regarding their child's education did not meet this threshold requirement. *Id.* at 829. During the time the child was attending the public school, the parents communicated with school officials and discussed possible changes in the student's placement. In fact, during these conversations the parents indicated that they were dissatisfied with the current placement, that they might consider seeking a private placement for the child, and they might ask for reimbursement. However, the parents did not initiate such action but instead unilaterally withdrew the child from the public school and placed her in a private facility. *Id.* at 826-28.

In finding that the parents did not meet the threshold test, the court stated that "the Evanses neither formally nor informally asked [the school district] to make a change in Christine's placement." *Id.* at 829. Rather, "[f]rom the evidence the district court could have reasonably concluded that the Evanses decided that they wanted to place Christine in the program at [the private school], regardless of whether [the public school] could provide her with a free appropriate education. . . ." *Id.* Thus, while parents do not have to make a formal request for a change in placement, "the parents must make clear to the district that they want the school district 'to initiate' the change." *Id.* Because the Evanses did not do so, they were not entitled to reimbursement. *Id.*

Congress, in amending the IDEA in 1997, codified parent cooperation and notification as requisites to any claim for reimbursement. *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 (1st Cir. 2004) *citing*, *Rafferty v. Cranston Pub. Sch. Comm'n*, 315 F.3d 21, 27 (1st Cir. 2002). Parents and/or guardians are expected to give either oral notice that they are rejecting the IEP at the IEP

meeting immediately preceding removal of the student, or notify a school district in writing ten days prior to removal of their intent to obtain private placement at public expense. 20 U.S.C. §1412 (a) (10) (C) (iii) (I). *Rafferty v. Cranston*, 315 F.3d at 27 (hearing officer's denial of tuition reimbursement due to parental failure to comply with IDEA's ten-day notice requirement.) The statutory notice provision evidences Congress' intent that parents serve notice for the purpose of providing school districts an opportunity to address their concerns and provide FAPE. *Greenland* at 160 *citing Patricia P*., 203 F.3d at 468; *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998).

The regulations implementing the IDEA's notice provision provide additional interpretive guidance and must be given deference. *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883, 892, 82 L.Ed. 2d 664, 104 Sup. Ct. 3371 (1984). The United States Department of Education ("DOE") has organized these regulations by reference to unilateral private placement. In doing so, DOE has been held to view notice as critically important to reimbursement. In fact, the regulations (and the statute) require denial of reimbursement to parents who unilaterally place a child in a private setting without ever questioning the school district's provision of FAPE. *Greenland*, 350 F.3d at 160. In *Greenland*, parents unilaterally placed their child in a private school without any notification to the school district. After enrolling the child in private school, the parents filed a Due Process Complaint alleging the school district failed to identify the child, and sought reimbursement of the private school tuition. In upholding the District Court's denial of reimbursement, the United States Court of Appeals for the First Circuit held that the statutory and regulatory language of the IDEA preclude reimbursement when parents have failed to reject the IEP or notify the school district prior to unilaterally placing a child in a private setting. *Id. at 161*. Reiterating the U.S. Supreme Court's

admonition in *Burlington*, the Court concluded that in a case such as this, where a parent fails to comply with the statute's notification requirement, reimbursement is to be denied.

> Once a child's parents have unilaterally removed the child from public school, subsequent notice almost a year after removal does little good.
>
> As the Supreme Court warned almost twenty years ago, "parents who unilaterally change their child's placement . . . without the consent of state or local school officials, do so at their own financial risk." *Burlington, 471 U.S. at 373-74*. This case demonstrates that the Court's admonition remains no less true today.

Id.

Clearly, the plain language of the statute and the regulations necessitates the contemporaneous rejection of the IEP or timely written notification of the intent to remove the student, obtain private placement and seek reimbursement from the school district as a prerequisite to parental reimbursement. In this case, the uncontested evidence at hearing establishes that the Parents never rejected any IEP or notified the District in writing of their intent to enroll Student in a private setting and seek reimbursement. Therefore, reimbursement is inappropriate as a matter of law. *See also Doe v. Bd. of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 456 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 2104 (1994) (denying reimbursement to parents of disabled students and noting that, even if the private school could provide services superior to those offered by the public school, the IDEA did not mandate a placement there).

In the instant case, the Parents failed to comply with the 1997 Amendments to the IDEA or with the *Evans* test. More specifically, at the hearing, Student's Mother testified that she never rejected the initial IEP in September 2002 or any of the amendments adopted in November 2002, January 2003 or February 2003. (Tr. 241, 249, 269, 273-274, 310). Likewise, she never notified the District in any manner that she desired or was requesting private speech and/or occupational

therapy, or intended to withdraw Student, place him in a private setting and seek reimbursement. (Tr. 290, 309-310). Student's Mother never requested a Howard Park placement at any time nor did she request reimbursement for tuition or private therapies. (Tr. 209). It is clear that the Parents never rejected a proposed District placement or services. No placement or services were ever developed, offered or proposed as a result of any IEP meetings that the Parents were not fully involved in, and at a minimum acquiesced, if not consented to. Because the Parents never rejected Student's IEP, and failed to notify the District in advance that they were seeking a private placement and private therapy services at District expense, they are not entitled to the requested reimbursement.

In light of the foregoing, the Panel makes these final conclusions:

1. The Panel concludes that the District compiled sufficient data and information to properly evaluate Student in August and September 2002. The Panel further finds that the District correctly assessed Student's disability and developed appropriate IEPs during the 2002-2003 school year.
2. The Panel further finds that the IEPs developed for Student throughout the 2002-2003 school year were reasonably calculated to provide, and did provide Student with educational benefit.
3. The Panel further finds that Student made progress on the goal and objectives contained in his IEP during the 2002-2003 school year.
4. The Panel further finds that the District provided a FAPE to Student during the 2002-2003 school year.
5. The Panel further finds that because the District provided Student with a FAPE during the 2002-2003 school year, the Parents are not entitled to reimbursement. The Panel therefore denies reimbursement.

6. The Panel concludes that, although the 2002-2003 IEPs contained some inadequacies, the IEPs were reasonably calculated to provide Student with educational benefit and that any inadequacies are either de minimus or could be rectified at Panel direction.

7. The Panel further finds that the Parents failed to cooperate in the IEP process and are, therefore, not entitled to reimbursement.

8. The Panel denies reimbursement for the time frame between August 2003 to the present, for which Petitioners seek such relief because Howard Park was and remains too restrictive a placement and is, therefore, not appropriate.

9. The Panel finds that, in placing Student at Howard Park and purchasing private speech and occupational therapy, the Parents assumed the financial risk per *Burlington* and, therefore, reimbursement is not appropriate.

10. The Panel further finds that the Parents never rejected Student's IEP and never furnished written notice to the District of their intent to unilaterally place Student in a private setting and seek reimbursement. By failing to do so, the Panel finds that the Parents failed to comply with the statutory imperatives for reimbursement. The Panel, therefore, denies the Parents' claim for reimbursement.

11. The Panel finds that the District agreed to conduct an occupational therapy evaluation on Student in February 2003, and that this evaluation was to include a sensory integration component.

12. The Panel further finds that the District failed to complete the sensory integration component as part of the occupational therapy evaluation it completed in April 2003.

13. The Panel further finds that because of the failure to include a sensory integration component as agreed, the District's 2003 occupational therapy evaluation was incomplete. Because the 2003

occupational therapy evaluation was incomplete, Student's sensory needs may not have been accurately assessed, and he may not have been furnished appropriate occupational therapy services.

14. The Panel further finds that in order to assess Student's current sensory needs, he should be re-evaluated.

V. Decision and Order

Accordingly, except as provided below, the Panel finds in the District's favor with respect to all issues raised by the Student at the hearing, including the Parents' claim for reimbursement for a unilateral parent placement; and,

The Panel finds in Student's favor with respect to the issue that the District failed to include sensory integration into the occupational therapy evaluation of Student, and hereby directs the District to complete a new occupational therapy evaluation of student and said evaluation must include a sensory integration component; and,

The Panel finds that if the aforementioned occupational therapy evaluation recommends additional occupational therapy services, the District shall provide compensatory education and or related services consistent with those recommendations.

APPEAL PROCEDURE

PLEASE TAKE NOTICE that this Decision constitutes the final decision of the Department of Elementary and Secondary Education in this matter.

PLEASE TAKE NOTICE that you have a right to request a review of this Decision pursuant to the IDEA and/or Missouri law, §§ 162.962, 536.010 *et seq*. RSMo.

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. § 300.512.

Dated:_____ _____

Joshua E. Douglass
Due Process Hearing Chairperson

Concurring Panel Member
Ms. Christine Montgomery

Dissenting Panel Member (Dissent Attached)
Ms. Jean Adams

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was faxed and mailed, postage prepaid, by First Class United States mail, to the attorneys of the parties of record at the address set out below, on this ____ day of June, 2004:

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